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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

NO. [redacted] 66

WILLIAM B. MILLIKEN, MARGARET M. MILLIKEN, TEXAS PRODUCTION COMPANY, a Corporation, and THE OHIO OIL COMPANY, a Corporation,
Petitioners,

vs.

VIOLET L. MEYER, Both Individually and as Administratrix, with the Will Annexed, of the Estate of Raymond D. Meyer, Deceased,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

NO. 978

WILLIAM B. MILLIKEN, MARGARET M. MILLIKEN, TEXAS PRODUCTION COMPANY, a Corporation, and THE OHIO OIL COMPANY, a Corporation,

Petitioners,

vs.

VIOLET L. MEYER, Both Individually and as Administratrix, with the Will Annexed, of the Estate of Raymond D. Meyer, Deceased,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS OF COURT BELOW

The first opinion of the Colorado Supreme Court is reported under the style of Meyer v. Milliken, et al., 101 Colo. 564-586, 76 Pac. (2d) 420 (See also R. 211-237). The second opinion of that court in this cause has not as yet been officially reported but may be found at pages 239-246 of the record and in the Pacific Reporter advance sheets for April 12, 1940, at page 151 (100 Pac. (2d) 151).

JURISDICTION

The petition for Writ of Certiorari is presented under Section 237(b) of the Judicial Code as amended by Act of February 13, 1925, 28 U.S.C.A., Sec. 344(b).

THE UNITED STATES SUPREME COURT IS WITHOUT JURISDICTION TO GRANT A WRIT OF CERTIORARI FOR THE REASONS FOLLOWING:

1. It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record not only that a Federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the Federal question was necessary to the determination of the question, and that it was actually decided or that the judgment as rendered could not have been given without deciding it, whereas it appears affirmatively from the record in this case that the Colorado Supreme Court rested its decision upon a non-Federal ground adequate to sustain it.

2. The record does not contain an authenticated or duly attested copy of the Wyoming Court record or of its decree or judgment.

3. The record does not disclose any substantial title, right, privilege of immunity claimed by petitioners, or either of them, that has been denied by the decisions of the Colorado Supreme Court.

4. The Wyoming Court decree is based upon constructive service (R. 9).

STATEMENT OF CASE

We desire to conform to paragraph 4 of Rule 27, but confess some difficulty in our endeavor to make

what we deem to be an intelligent statement without repeating portions of petitioners' "Statement of Facts."

R. D. Meyer, or Raymond D. Meyer, respondent's predecessor in interest, in his lifetime, and on August 31, 1922, entered into a written agreement with Transcontinental Oil Company, a Delaware corporation, to acquire oil and gas rights in and to lands in Moffat and Routt Countries, Colorado (R. 159), plaintiff's Exhibit "R" (but the page at which it was offered in evidence is not in the record), for which services he was to receive a one-sixteenth of the net profits from oil and gas operations and development conducted upon the properties, permits or leases which he would secure and assign to said Company, the lands being particularly described in a schedule attached to said agreement, which schedule is referred to in the agreement, but is not contained in the record.

Said Meyer secured certain lands as agreed, assigned them, or his interest in them, to said Company and in said lands is situated what is known as the "Moffat Pool," and certain of the lands so secured by said Meyer were lands belonging to the United States Government as to which lands he secured an oil and gas prospecting permit, and that agreement is witnessed as to its execution by the petitioner, W. B. Milliken (R. 163).

Thereafter and on June 21, 1923, said Company assigned and transferred to the petitioner, Texas Production Company, a one-half interest in said lands and said contract, and said Texas Production Company (R. 4) by said assignment agreed to and did develop certain of said lands and procured oil production, agreeing at the same time to fulfill the obligations of the assignor to said Meyer under the agreement between said Meyer and said Transcontinental Oil Company of August 31, 1922.

Following production, said petitioner William B. Milliken and his son, Carl, asserted that they owned a two-thirds interest in the Meyer-Transcontinental Oil Company agreement and made demand upon said Company for such an interest (R. 26) and following negotiations with Transcontinental Oil Company and on May 3, 1924 (R. 26), petitioner, W. B. Milliken, secured from said Company a written agreement whereby, being willing "to buy peace" (R. 26-29), it agreed to pay to said petitioner a one thirty-second of the production and at the same time and as a part of the same transaction petitioner and his son, Carl, assigned their every claim and demand previously asserted against said Meyer and also as against his one-sixteenth profits interest to said Company (R. 27).

Said petitioner thereafter received his one thirty-second of production and utilized it until about July 26, 1927, when he decided to repudiate his assignment to said Company and his agreement for the one thirty-second of production, and though living at that time in Denver, Colorado, as he had previously for years, instituted an action at Rawlins, Wyoming, in the District Court of Carbon County, against said Transcontinental Oil Company and said Meyer, charging them, as joint tort feasors, with conspiracy and fraud and sought an accounting and cancellation of his contract with said Transcontinental Oil Company (R. 7) and (R. 8) sought from said Company 17½ per cent of profits from said lands.

That on or about March 22, 1928, said petitioner by one of his attorneys, C. R. Ellery, made and on March 28, 1928, filed with the Clerk of said Court an "Affidavit for Constructive Service" on said Meyer (R. 9), charging that Meyer was a resident of Wyoming, living part of the time in Wyoming and part of the time in Colorado, and that he was remaining out of the State of Wyoming and concealing himself to avoid service of summons, though at the time of filing his petition in

July, 1927, which was verified by his said attorney, he alleged (R. 7)

> "that said defendant Meyer, in taking out certain permits in the name of said plaintiff covering unfavorably located lands within the Hamilton and Isles structures, showed plaintiff's address as being at 1114 Logan Street, Denver, Colorado, when in truth and in fact, said address was the residence of the said Meyer, and was not the address of said plaintiff, and this was well known to the said defendant."

Paragraph Ninth (R. 8) of respondent's complaint is the following:

> "Ninth. It is alleged said Meyer was not a resident of Wyoming on March 26, 1928, nor at any time thereafter to the date of his decease on August 17, 1935, nor at any time prior to March 26, 1928, and subsequent to the month of June, 1920, and that at no time following the month of June, 1920, did he live in the State of Wyoming, and that he did not remain out of the State of Wyoming nor conceal himself to avoid service upon him of the summons issued out of the District Court of Carbon County, Wyoming, but that at or about the month of June, 1920, he moved with family from the State of Wyoming with the intention of becoming and being a resident of Colorado and that at the date of his decease he resided with his family in the City and County of Denver in Colorado and during practically the entire period so resided at 1114 Logan Street, Apartment 7, in said City and County."

On March 30, 1928, Meyer was served with process in Denver, Colorado (R. 15), and made no appearance in response to the process, either general or special, neither in person nor by attorney (R. 16). The case subsequently being at issue as between said petitioner

and the alleged joint tort feasor Transcontinental Oil Company was tried on May 15, 1931 (R. 32), and on July 11, 1931, findings and decree were made and entered (R. 32-39).

By the decree the Court found and adjudged in favor of Transcontinental Oil Company and against said Milliken, dismissed the case as to said Company and awarded it judgment against Milliken for costs (R. 37), and at paragraph Second (R. 33) of decree recites,

> "that the written contracts set forth in the pleadings and proofs by and between the plaintiff and the Transcontinental Oil Company (sometimes herein called the Transcontinental Oil Company of Colorado) and bearing date of May 3, 1924, were entered into between said plaintiff and defendant corporation, and between said plaintiff and Carl S. Milliken on the one part and the said defendant corporation, in good faith on the part of said defendant corporation and for good consideration, and made, executed and delivered on the part of said plaintiff for good consideration and with full knowledge, and without any fraud, deception or conspiracy on the part of said defendant corporation, and was in good faith kept and performed by the said Transcontinental Oil Company, and that said plaintiff after the execution and delivery of said contract, accepted, benefitted by and ratified the said contract."

By the same decree the Wyoming Court defaulted said Meyer for failure to appear, plead or answer (R. 32) and found in favor of said Milliken that he was entitled to one-fourth of Meyer's one-sixteenth, a one sixty-fourth, and directed the entry of a judgment for more than $30,000.00 based upon the accumulation of one sixty-fourth net production from the date of production to the date of directing the said entry, made

further findings in favor of said Milliken and against Meyer as to the one sixty-fourth net production, enjoined Meyer from receiving and Transcontinental Oil Company from paying the one sixty-fourth to Meyer after the Transcontinental Oil Company had been dismissed out of the case and "With Prejudice," though the producing lands were, as shown by Exhibit "R," in the State of Colorado and had not been, nor was any attempt even made to, by any remedial process, bring the property of Meyer within the jurisdiction of the Court or under its control; that having made the findings as to the one sixty-fourth as stated, it did not adjudge or even assume to adjudge the one sixty-fourth to Milliken or to any person for him, or to any other person or Company, nor away from Meyer (R. 32-39).

The petitioner, the Ohio Oil Company (R. 6), after acquiring the remaining one-half interest of Transcontinental Oil Company in the Colorado lands and in the agreement, Exhibit "R," between said Meyer and Transcontinental Oil Company, became a joint owner with the petitioner Texas Production Company and agreed with said Transcontinental Oil Company to perform its obligations set forth in the Meyer-Transcontinental Oil Company agreement, and following that status (R. 6) it received from Texas Production Company its proportion of the profits interest which belonged to Meyer and refused and still refuses to pay to Meyer, or respondent, the one-fourth of the one-sixteenth profits interest that, as stated above, was never adjudged away from Meyer.

That thereafter the petitioner, Margaret M. Milliken, the wife of petitioner, William B. Milliken, claiming to be the assignee of the judgment secured by him in the Wyoming Court, against Meyer, made demand upon petitioner, The Ohio Oil Company, to make payment to her of the monies representing said one sixty-fourth net profits production, which petitioner, The Ohio Oil Company, had withheld from said Meyer, and

on or about March 16, 1935, the petitioner, The Ohio Oil Company, acting in its own behalf and for petitioner, Texas Production Company, in response to the demand of said petitioner, Margaret M. Milliken, paid to her of the said money so withheld, $4,355.49 and thereafter made additional payments from the one sixty-fourth so withheld, totaling an aggregate of $4,829.49 (R. 70), which money (R. 70) it alleged it had been retaining in a special account from the production of said "Moffat Pool."

Following Meyer's decease on August 17, 1935, respondent, pursuant to the order of the Probate Court having jurisdiction of his estate, instituted an action in equity (R. 2) against the petitioners to have decreed *void* and a *nullity* the decree of the District Court of Carbon County, Wyoming, as to said Meyer; also for injunctive and other relief, alleging among other things,

Paragraph Twenty-seventh (R. 55) the following:

> "That the judgment and decree of the District Court of Carbon County, Wyoming, was and is as to said R. D. Meyer, deceased, as a defendant, in said action in said Carbon County Wyoming Court, absolutely void as having been rendered by said Court without jurisdiction of the person of said deceased and without jurisdiction of his property, which by its decree it assumed to impound, and does not even follow nor conform to, but contravenes the findings of the Court as set forth in said decree, and if said judgment be allowed to stand and be made effective as to said R. D. Meyer, it will cause plaintiff irreparable injury."

Paragraph Twenty-eighth (R. 55) the following:

> "That due process of law did not and has not obtained in said action."

and paragraph Twenty-ninth of respondent's complaint (R. 55) alleges that the judgment rendered by the Wyoming Court is in violation of the constitution of the State of Wyoming, Sec. VI, Article I thereof, and is in violation of that portion of Article XIV, Section 1, of the Constitution of the United States which says, "nor shall any state deprive any person of life, liberty or property without due process of law," and contravenes and violates as well Article V of the Amendments to the Constitution of the United States.

Milliken in his joint answer with his wife, Margaret M. Milliken, who is claiming as his assignee, filed their answer (R. 103) wherein he admits that he resided in Denver, Colorado, at the time of instituting his action in the Wyoming District Court.

Said action by respondent, both individually and as Administratrix with the will annexed of the estate of said Meyer, following trial in the Colorado trial court was dismissed by said Court for want of equity (R. 143), the trial court saying,

> "For the foregoing reasons I find the issues joined in favor of the defendants and each of them and against the plaintiff. I find there is no equity in the bill. The bill should be dismissed. The bill is dismissed."

The judgment order of the trial court so dismissing the bill is at R. 143.

Upon Writ of Error from the Colorado Supreme Court the judgment of the Colorado trial court was reversed; see Colorado report, 101 pp. 564-586, 76 Pac. (2d) 420 (R. 211-237); and was remanded to the Colorado trial court with directions (R. 168-170) where the trial court refused to sign the judgment order presented by respondent's attorney but signed the one presented by petitioner's attorney, whereupon respond-

ent again went to the Colorado Supreme Court on Writ of Error, and that Court affirmed the judgment order so signed by the trial court and held, among other things, that "the error, if any there were, is clearly harmless," and adhered to its former decision. The cross errors assigned by petitioners having been overruled by the Colorado Supreme Court (R. 239-246) the petitioners are seeking a review. The last opinion of the Colorado Supreme Court, being as yet not officially reported, may be found at pp. 239-246, Pacific Reporter Advance Sheets for April 12, 1940, and at page 151 of 100 Pac. (2d).

SUMMARY OF ARGUMENT

1. Although a Federal question has been raised by petitioners, the decisions of the Colorado Supreme Court are rested upon a non-Federal ground sufficient to sustain them.

2. The failure of the record to contain an authenticated copy (or duly attested copy) of either the Wyoming decree or of the record of procedure in the Wyoming Court deprives the United States Supreme Court of jurisdiction to review.

3. The Wyoming Supreme Court was without jurisdiction of respondent's predecessor in interest, R. D. Meyer, now deceased, or of his property which was located in the State of Colorado.

4. Judgments based upon constructive service may not be reviewed in virtue of the full faith and credit clause of the Federal Constitution, Article IV, Section 1.

ARGUMENT

I.

JURISDICTION

THE UNITED STATES SUPREME COURT is without jurisdiction to grant a Writ of Certiorari for the reasons following:

Reading from Lynch, et al., v. New York, 293 U. S. 52-55, 79 L. ed. 191, a case wherein the State Tax Commission determined that rental received by a resident of New York from real property situated in the State of Ohio should be included as a part of her income. She sought a review by the Supreme Court of New York, invoking rights under the Constitution and laws of New York and under the Fourteenth Amendment of the Constitution of the United States. The appellate division of the New York Court annulled the determination of the State Tax Commission and that Court, while citing decisions of the United States Supreme Court under the Fourteenth Amendment, did not state that its decision rested upon the application of the Constitution of the United States. The Court of Appeals of New York affirmed the order of the appellate division but without opinion, the grounds of its decision were left to conjecture and it is said by this court:

> "But jurisdiction cannot be founded upon surmise. Nor can claim of jurisdiction be sustained by reference to briefs and statements which are no part of the record.
>
> "It is essential to the jurisdiction of this court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a Federal question was presented for decision to the highest court of

> the State having jurisdiction but that its decision of the Federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it."

And it is then said by this Court:

> "Where the judgment of the State court rests on two grounds, one involving a Federal question and the other not, or if it does not appear on which of two grounds the judgment was based, and the ground independent of a Federal question is sufficient in itself to sustain it, this Court will not take jurisdiction."

In the case at bar it decisively appears that while a Federal question is raised by petitioners, the decisions of the Colorado Supreme Court were rested wholly and solely upon a non-Federal ground. Jud. Code, Sec. 237(b), 28 U.S.C.A. Sec. 344(b); McGoldrick, Comptroller of City of New York v. Gulf Oil Corporation, 84 L. ed., Advance Opinions, No. 6, p. 336; Honeyman v. Hanan, 300 U. S. 14-26, 81 L. ed. 477; City of New York v. Central Savings Bank, 306 U. S. 661, 83 L. ed. 1058, 59 S. Ct. 790.

II.

THE COLORADO SUPREME COURT RESTED ITS DECISION ON A NON-FEDERAL GROUND ADEQUATE TO SUSTAIN IT.

In connection with the subject under discussion, we are assuming at this time to quote at some length (a little more than four pages) from the opinion of the Colorado Supreme Court, Meyer v. Milliken, et al., 101 Colo. 564-586, 76 Pac. (2d) 420 (R. 230-234), a lengthy opinion, but which we feel may tend to a

saving of this Court's time as against the time we might occupy in our deductions, interpretations and comment thereon, which quotation from the Court's opinion is the following:

> "So many interesting questions are rarely presented as are disclosed by the record in this case, and we have an outstanding example of an attempt by each party to rely upon the weakness of the other's cause of action or defense, instead of the strength of his or its position. The authorities tend to support, and we find merit in both the cause of action and the defenses thereto. Equity therefore requires that the substance of this controversy controls rather than exactness of form. With this in view, we need not concern ourselves with the question of whether or not the Wyoming court had jurisdiction of the parties and subject matter in the case before it, which we do not decide. We content ourselves with a discussion of the effect of the judgment there entered. Concerning the one sixty-fourth interest in the profits of production from the lands involved, it is not disputed that Meyer acquired such interest through and under the contract of August 31, 1922, between himself and the Transcontinental Oil Company. The only person or persons shown to have ever claimed any part of this interest were Milliken and his son, Carl S. It is in no way controverted that on May 3, 1924, the Millikens for a valid consideration, then received and retained by them, sold and assigned, not only this particular interest, but any and all claims of every nature they had against Meyer in connection with all lands here involved or the proceeds from the operations thereon, to the Transcontinental Oil Company. This contract of sale, and the assignment thereunder, was found by the Wyoming Court under its decree to be valid. The only

suggestion of any basis for an action by Milliken against Meyer, rested upon the claim before its assignment. A study of the Wyoming decree and judgment discloses a full and complete adjudication of Milliken's claim by its finding that he had validly assigned it. This finding deprived the court — and incidentally Milliken — of any basis upon which it could predicate the judgment it later, and by the same decree, entered against Meyer. A judgment must have basis for its existence as a valid judgment. In this connection, it is significant to note that in the Wyoming decree and judgment, there is no judgment against Meyer or in favor of any of the defendants in the action now before us or in any other action shown by the record, for the one sixty-fourth of the net production from the lands involved. It is not disputed that this interest was the property of Meyer in his lifetime and descended to plaintiff in error. It was never transferred by him, or anyone for him, or alienated from him in any way, or taken from him by the decree or judgment of any court. When the Wyoming court entered a personal judgment against Meyer in favor of Milliken, whom it found had transferred and assigned his every claim against Meyer, it recorded an irreconcilable contradiction of the terms of the finding and decree, and these are so inconsistent as to result in a mere nullity, and particularly the judgment rendered in favor of Milliken and against Meyer. There is no precedent based upon sound legal or equitable principles which will warrant an approval by us of a judgment based upon an alleged cause of action which by judicial ascertainment it is established had been sold and assigned by the plaintiff to another for a valid consideration. Such is the glaring result appearing in the Wyoming judgment upon its

face. Our conclusions are not the result of a technical construction of the decree when read and considered as a whole. The decree in no way otherwise gave any intimation that Milliken was entitled to the benefits derived from the thing he had sold. It made no disposition of the one sixty-fourth interest which stands now, as it always stood, for the use and benefit of Meyer and his successors. Of necessity this was as apparent to the Ohio Oil Company as it is to us, because its counsel participated in the Wyoming trial, was familiar with the decree and judgment therein entered, and was at all times conversant with the effect of such decree. It cannot now deny its construction of the decree in face of its answer filed herein; notwithstanding, without any right or authority it paid the money here in question to Margaret Milliken out of the one sixty-fourth interest shown to have been still remaining in Meyer. In its answer herein, the Ohio Oil Company alleged the contract between Milliken and the Transcontinental Oil Company whereby Milliken and his son jointly and severally sold to that company all and singular the rights, interests, claims and demands of every kind or nature which they had against R. D. Meyer in anywise pertaining to any and all lands in Colorado, or the one-sixteenth interest of Meyer therein, and that one-sixteenth included the one sixty-fourth interest now in dispute. It further alleged that the Millikens were estopped thereby to make any claims against it as to the said one sixty-fourth interest; that they were not entitled to any part thereof; that the payments made by it to Margaret Milliken covering the one sixty-fourth interest were made, through a mistake of fact, to the wrong person without any consideration from Margaret Milliken and because of "forget-

fulness" of said agreement of May 3, 1924, when nothing was due or owing Margaret Milliken or William Milliken under any contract; that in equity and good conscience this money should be repaid to it by the Millikens. The Millikens filed no answer to this cross-complaint, and we have no intimation of their position with reference thereto, other than the opening statement of their counsel at the time of trial to the effect that so far as the cross-complaints of the Ohio Oil Company and the Texas Production Company are concerned, counsel was willing to stipulate that one or the other of the oil companies is entitled to a judgment against the Millikens in the event the court should enter judgment in favor of the plaintiff against either of the oil companies. In this equitable action, it is not a matter of the courts of this state being concerned about the full faith and credit of constitutional provisions relative to judgments of a sister state, the important question being as to the effect of the judgment of a sister state—palpably void on its face—upon the rights of citizens of this state who are parties to the equitable cause of action in this state. A court of this state unquestionably has the power to enjoin the enforcement of such a foreign judgment between the citizens of this state who are before the court and in the state.

"The plaintiff herein was, and is, entitled to maintain this equitable action, it appearing that her property rights have been invaded by reason of her being deprived of money due or to become due her by virtue of a judgment which, in so far as it purports to be effective against her, is void on its face because pronounced by a court which had deprived itself of jurisdiction to enter the particular judg-

ment against Meyer. Judgments must conform to the findings of the court in such a substantial particular. Bartlett v. Hammond, 76 Colo. 171, 230 Pac. 109. Applying this rule, the judgment of the Wyoming court, in order to comply with the finding of the court by the same decree, would have been one of dismissal of the cause of action against Meyer, because the court already had found that any claim Milliken had ever had or made against Meyer, had been by him sold and assigned to the Transcontinental Oil Company, leaving him without a cause of action against Meyer."

III.

THE RECORD DOES NOT CONTAIN AN AUTHENTICATED COPY OF THE WYOMING PROCEEDINGS AND NOT EVEN OF ITS DECREE OR JUDGMENT.

The authentication is required by R. S. Sec. 905, Title 28 U.S.C.A., Sec. 687 (Appendix A) or such an authenticated or attested record as is provided for by Wyoming Rev. Stat., 1931, Sec. 89-1732 (Appendix B).

While the Colorado Supreme Court considered the Wyoming decree, a failure of the record to contain an authenticated copy deprives this Court of jurisdiction to review the decisions of the Colorado Supreme Court under the full faith and credit clause of Article IV, Section 1, of the United States Constitution.

Both Federal and State courts uniformly require that a judgment of a sister state to constitute competent evidence when offered as such in a proceeding in another state must be authenticated either in compliance with the Act of Congress prescribing the manner which will entitle a judicial record so authenticated

to consideration under the full faith and credit clause, of Article IV, Section 1, or in compliance with the Statutes of the State in which the judgment is rendered, and in the absence of any authentication jurisdiction, to review under the constitutional provision, is lacking.

The Supreme Court of the United States has uniformly held that the Act of Congress prescribing the manner of authentication of a judicial record indicates clearly that only such records or procedings as are so authenticated are entitled to have full faith and credit given to them in the courts of other states within the United States as they have by law or usage in the courts of the state in which they are obtained.

The fact that the Wyoming judgment was admitted in evidence without authentication does not constitute a compliance with this requirement and there being no authentication, there is no power of review. Richard Christmas, Plaintiff in Error v. John W. Russell, etc., 72 U. S. 290, 18 L. ed. 475; Allen T. Caperton, Plaintiff in Error, v. William A. Ballard, Admr., 81 U. S. 238; 20 L. ed. 885. John Turnbull, Jr., Plaintiff in Error, v. Joseph R. Payson, Defendant in Error, 95 U. S. 418, 24 L. ed. 437; Mills v. Duryee, 7 Cranch 481, 3 L. ed. 411; Michael Hanley, et al., Plaintiffs in Error, v. Charles Donoghue, 116 U. S. 1, 29 L. ed. 535.

IV.

THE RECORD DOES NOT DISCLOSE ANY SUBSTANTIAL TITLE, RIGHT, OR PRIVILEGE OF IMMUNITY CLAIMED BY PETITIONERS, OR EITHER OF THEM, THAT HAS BEEN DENIED BY THE DECISIONS OF THE COLORADO SUPREME COURT.

The Wyoming decree which is the basis of petitioners' application for review is grounded upon con-

structive service. A decree based upon such service does not furnish the basis of a claim of right, title, privilege or immunity subject to review under Article IV, Section 1, of the Federal Constitution and could not be the basis of asserting a claim in a sister state as the court hearing the Wyoming cause based upon constructive service had authority only to make its judgment effective as to the res, if any, located within the territorial jurisdiction of the Wyoming court. John W. Haddock v. Harriet Haddock, 201 U. S. 562, 50 L. ed. 687; McDonald, et al., v. Mabee, 243 U. S. 90-93, 61 L. ed. 608 (at page 610, last half of left hand column).

V.

THE WYOMING DECREE IS BASED UPON CONSTRUCTIVE SERVICE AND MAY NOT BE REVIEWED UNDER FULL FAITH AND CREDIT PROVISIONS OF THE FEDERAL CONSTITUTION.

Hart v. Sansom, 110 U. S. 151-156, 28 L. ed. 101. An action by Hart, a citizen of Louisiana, to reverse a judgment rendered against him in the circuit court of the United States for the northern district of Texas, and wherein service had been had upon Sansom by publication. Reading from the opinion, beginning third line from bottom, left hand column of page 103, it is said:

> "Such a decree being in *personam* merely, can only be supported against a person who is not a citizen or resident of the state in which it is rendered by actual service upon him within its jurisdiction; and constructive service by publication in a newspaper is not sufficient. The courts of the state might, perhaps, feel bound to give effect to the service made as directed by its statutes but no court deriving its authority from another government will recognize a

merely constructive service as bringing a person within the jurisdiction of the court. The judgment would be allowed no force within the courts of any other state; and it is of no greater force as against a citizen of another state in a court of the United States, though held within the state in which the judgment was rendered."

VI.

RESPONDENT'S ATTACK UPON THE WYOMING JUDGMENT IS DIRECT AND NOT COLLATERAL.

Atchison, Topeka & Santa Fe Railway Co. v. Commissioners, et al., 95 Colo. 435, 37 Pac. (2d) 761. The statement by counsel for petitioners that the action by respondent was a collateral attack is not sustained by the facts in this case as the action instituted by respondent is one in equity to have the Wyoming judgment decreed *void* and a *nullity;* also for injunctive and other relief.

The case of Atchison, Topeka & Santa Fe Railway Co. v. Edmund R. Wells and his counsel, 265 U. S. 101, 68 L. ed. 928, is one wherein Wells, an employee of said Railway Company, a citizen and resident of Colorado, was injured while performing his duties in New Mexico. He sued the Company in a state court but could not make personal service upon it within that state and proceeded by garnishment and constructive service to impound some property and money belonging to said company, which did not appear at the trial and judgment was rendered against it by default for $4,000.00 and costs.

The action was one

"to enjoin the enforcement of these judgments suit was brought by the Santa Fe in the Federa

Court for Western Texas against Wells, who had meanwhile become a resident of that state, and his counsel. The case was heard upon agreed facts and a decree dismissing the bill was affirmed by the United States Circuit Court of Appeals for the fifth circuit.

About the middle of the right hand column, at page 931, it is said:

> "Relief against the void judgments entered was properly sought by the Santa Fe in the Federal court."

citing cases, and the judgments of the lower courts were reversed.

VII.

THE WYOMING COURT WAS WITHOUT AUTHORITY TO ENTER A VALID JUDGMENT IN FAVOR OF PETITIONER WILLIAM B. MILLIKEN AND AGAINST RESPONDENT'S PREDECESSOR IN INTEREST, R. D. MEYER.

This record discloses that more than three years prior to the institution of his action in Wyoming, Milliken had sold and assigned his alleged claim against Meyer to Transcontinental Oil Company, and having so sold and assigned it had no basis for an action remaining. National Exchange Bank of Tiffin, Ohio, v. Wiley, 195 U. S. 257-270, 49 L. ed. 184-190, where this court says:

> "The general jurisdiction of the Ohio Court undoubtedly embraced such a cause of action as was set forth in the suit on the note but we are of the opinion that that court had no authority or jurisdiction to render judgment against the obligors of the National Exchange Bank if the National Exchange Bank had in fact sold the

note and ceased before the commencement of that suit to own it or to be entitled to receive the proceds to its own use. It was in such case, in legal effect, a personal judgment without service of process upon the defendant and without the appearance in person or by an authorized attorney. The proceedings are wanting in due process of law."

In the case at bar, it is admitted by the petitioners that Milliken had long prior to the institution of his action in Wyoming assigned his every alleged or asserted claim against Meyer to Transcontinental Oil Company.

VIII.

THE ONE SIXTY-FOURTH (1/64) INTEREST IN THE OIL PRODUCED FROM THE LANDS PROCURED BY R. D. MEYER FOR TRANSCONTINENTAL OIL COMPANY WAS NOT ADJUDGED TO ANY OF THE PETITIONERS, OR ANY OTHER PERSON. BY THE WYOMING COURT DECREE.

The foregoing statement being admitted by the petitioners needs no citations of authorities.

IX.

THE EQUITABLE ACTION INSTITUTED BY RESPONDENT IS IN ACCORDANCE WITH AUTHORIZED PROCEDURE.

In support of that statement we cite Atchison, Topeka & Santa Fe Railway Company v. Wells, et al., 265 U. S. 101, 68 L. ed. 928.

X.

SECTION 5641 OF WYOMING COMPILED LAWS, 1920, DID NOT AND DOES NOT EVEN PURPORT TO AUTHORIZE A JUDGMENT IN PER SONAM.

Appendix E (R.14) under the subject, "Constructive Service;" the first section under said subject being 5636 (R. 10), provides for service by publication and recites the numerous cases in which publication is available and which discloses that the actions which may be so brought are in proceedings in rem, and Sec. 5641 reads, as to the material portion thereof, under the subject, "Personal Service Out of State:"

> "Sec. 5641. Personal Service Out of State. In a case where service may be made by publication under the provisions of this chapter, personal service of a copy of the summons and the petition in said action may be made out of the state,"

and it requires something aside from stated facts to disclose that such service authorized or authorizes a judgment in per sonam against one so served.

XI.

THREE ELEMENTS CONSTITUTE THE JURISDICTION OF A COURT.

State ex rel, Yohe v. District Court of 8th Jud. Dist., Natrona County, 35 Wyo. 281, 238 Pac. 545-557. An original proceeding in the Wyoming Supreme Court wherein the Court's jurisdiction was involved, it is said that in addition to jurisdiction of the person and the subject matter, the procedure followed by the Court and the methods by which the judgment was obtained

must conform to the forms and practice of the Court, and cites, with approval, the case of People v. Burke, 72 Colo. 486-512, wherein it is said at page 504:

> "Jurisdiction, in its fullest sense, is not restricted to the subject matter and the parties. If the Court lacks jurisdiction to render, or exceeds its jurisdiction in rendering, the particular judgment in the particular case, such judgment is subject to collateral attack, even though the Court had jurisdiction of the parties and of the subject matter."

Citing cases, among which is Windsor v. McVeigh, 93 U. S. 274.

In re John Bonner on Petition for Writ of Habeas Corpus, 151 U. S. 242-262, 38 L. ed. 149.

This record discloses conclusively that the property of respondent's predecessor in interest, which was impounded by the Wyoming decree was at all times in the State of Colorado without the jurisdiction of the Wyoming Court and at no time was it by any remedial process attempted even to be brought within the jurisdiction of the Court or under its control.

The power of a court is not without limitation but is circumscribed by the law and does not extend to the arbitrary exercise of a mere determination to do and the doing of something contrary to law and natural justice.

Equity does not sanction wrong doing nor knowingly permit a wrong doer to profit by his wrong.

It is fundamental, and we may add elementary, that the law of a case is the law applicable to the facts of the particular case.

WHEREFORE, it is respectfully submitted that

jurisdiction to review on Certiorari is lacking and the petition should therefore be denied.

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APPENDIX

A.

Title 28 U.S.C.A., Section 687, R. S. Section 905,

"Authentication of legislative acts; proof of Judicial proceedings of State.

"The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seal of such State, Territory or country affixed thereto. The records and judicial procedings of the court of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken. (R. S. Sec. 905.)"

B.

Section 89-1732, Wyoming Revised Statutes, 1931,

"Certified copies of records as evidence.

"A certified copy of any paper or record under the hand and seal of the officer who, by the laws of this state, has the legal custody of such paper or record shall be competent evidence in any court to prove, and shall be prima facie evidence of, the contents of such paper or record. Copies of any books, records, papers, or

documents in any of the executive departments of the United States, authenticated under the seals of such departments, respectively, shall be admitted as prima facie evidence of the originals thereof. (L. '27, c. 68, Sec. 1, amending L. '23, c. 55, Sec. 1.)"

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C. Actual Service

"Sec. 5628. Service and Return of Summons. The service shall be by delivery at any time before the return day, of a copy of the summons with the indorsements thereon, together with a copy of the petition to the defendant personally, or by leaving a copy of the summons and petition at his usual place of residence with some member of his family, or other person in his employ over the age of fourteen years, * * * "

D. Constructive Service

"Sec. 5636. Service by Publication. Service by publication may be had in either of the following cases:

* * * * *

"6. In actions where the defendant, being a resident of this state, has departed from the county of his residence with the intent to delay or defraud his creditors, or to avoid the service of a summons, or keeps himself concealed with like intent."

E. Personal Service Out of State

"Sec. 5641. Personal Service Out of State. In all cases where service may be made by publication under the provisions of this chapter, personal service of a copy of the summons and the petition in said action may be made out of the state,"

F.

Black on Judgments, Vol. 1, 2d ed., Sec. 186:

"Judgment must follow verdict." * * * "The judgment to be valid must follow it and accord with it."

G.

Black on Judgments, Vol. 2, 2d ed., Sec. 781:

Successful Defense by one Joint Trespasser.

"In action of tort, where the wrong is joint and several, and the plea of one of the defendants is such as shows that the Plaintiff could have no cause of action against any of them, if the plea is found against the plaintiff, it operates to the benefit of all the defendants."

H.

Black on Judgments, Vol. 2, 2d ed., Sec. 901:

Record may be Contradicted. Says in part,

"It is fair to infer that the Constitution means nothing more than that full faith and credit shall be given to the valid and lawful judgments of the courts of a sister state."

I.

Corpus Juris, Vol. 34, Sec. 788. Relief Awarded.

"On a bill for an injunction against a judgment at law, properly framed, the court has authority to grant the parties any and all relief to which they may appear to be entitled, although the decree should not go beyond the prayer of the petition or bill. Such relief includes the vacation or annulment of the judgment, or a perpetual injunction against its enforcement, and the restitution of money already collected on it, or damages for the attempted or successful enforcement of the judgment by execution."

J.

Corpus Juris, Vol. 34, Sec. 1615(b). Presumption in Favor of Jurisdiction.

"In an action on a judgment recovered in another state, the record of which is duly authenticated and produced in evidence, it will be presumed that the court had jurisdiction of the subject matter and the parties, in the absence of proof to the contrary. But this rule does not apply where the defendant was a non-resident of the state where the judgment was rendered or is shown to have been absent from that state at the commencement of the action."

K.

Corpus Juris, Vol. 34, Sec. 1616(c). Extrinsic Evidence as to Jurisdiction—aa. to Show Want of Jurisdiction.

"The rule that a judgment cannot be collaterally attacked, unless a want of jurisdiction appears on the face of the record, does not apply to a foreign judgment."

L.

Freeman on Judgments, Sec. 353(a), 5th ed.—beginning twelfth line from bottom of page 732:

"The dismissal of a cause ousts the court of jurisdiction and thereafter it has no power to render an order or judgment in the cause or take any further action therein, until the order of dismissal is vacated, except as it may be necessary to close the litigation. And, if a judgment is rendered after dismissal, without first vacating or setting aside the dismissal order, so as again to bring the parties into the cause, such judgment is void."

M.

Freeman on Judgments, Sec. 308, 5th ed.—beginning second line from top of page 616; says:

"A suit to set aside a judgment does not cease to be a direct attack because relief is also asked from a sale and conveyance made under it, since the latter relief is only incidental."

N.

15 R.C.L., paragraph 193. Relief as to Void and Irregular Judgments. Beginning near bottom of page 738 reads:

"The general rule appears to be that a court of equity in a proper case will interfere where the irregularities or errors are of such character as to make the judgment ipso facto void, and it has been held that it makes no difference that the parties could obtain relief at law."

O.

Williams v. Hawkins, 75 Colo. 136:

"Jurisdiction includes not only the power to hear and determine a cause but to enter and enforce a judgment. If there is no right in the court to enter the particular judgment entered, the entry is without jurisdiction." * * * "The court points out that, if a court, having jurisdiction of the parties and the subject matter, renders a judgment in which it transcends the power conferred by law, in so doing, it acts without jurisdiction and its judgment is void."

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